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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/040,046	10/19/2001	John B. Taylor	396542	1834

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12/03/2007

EXAMINER
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LEVY, NEIL S

ART UNIT	PAPER NUMBER
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1615

MAIL DATE	DELIVERY MODE
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12/03/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/040,046

Applicant(s)

TAYLOR, JOHN B.

Examiner

NEIL LEVY

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

***Continued Prosecution Application***

**DETAILED ACTION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

***Claim Rejections - 35 USC § 112***

Claims 4 & 10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

These claims fail to further limit claim 1 & 3, & 1 & 9 respectively.

***Claim Rejections - 35 USC § 102***

Claims 1 & 2 are rejected under 35 U.S.C. 102(b) as being anticipated by Spraker- 4350770.

The instant aqueous salt solution of K phosphonate & K phosphate, diKPhosphate, within the claimed amounts are shown at Example 1. No patentable weight is given to future intended use of the composition.

***Claim Rejections - 35 USC § 103***

Claims 1, 2, 6 & 12 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Fenn et al '84 & Dolan et al '88, with evidence exemplified by Barlet-5070083

Fenn discusses Fosetyl solutions at high concentrations (first paragraph, p. 606) as known to be antifungal, dependent upon the particular fungal species &/or strain.

Fenn's work is at low dilutions, directed at mechanistic determinations. Barlet is an

example of the high levels of known use of Fosetyl , 1-120 g/l, applied to foliage(col. 3, lines 15-250. K phosphates were not addressed.

Dolan shows how one in the art can perform testing of effects of phosphorus K acid compounds, & also tests a mix with K Phosphate, in aqueous solution , to identify efficacy in control of fungus. Results (table 4 of Dolan) would lead one in the art to the common sense expectation that more is better. Simple testing of dose response effects of a strain & species of fungus of concern would permit one in the art to determine an optimal range of K Phosphate/Phosphonate concentrations.

### ***Response to Arguments***

Applicant's arguments, with respect to the rejection(s) of claim(s) 3 -5,7-11, 13 & 14 under 35 USC 103 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn for these claims. However, arguments that higher levels were not shown, & the art of record provides contrary expectation with a higher level as of the instant claims, is not persuasive , as one in the art would indeed expect increasing dose to result in increasing efficacy, but dependent upon the particular species & strain of fungus. Thus, the use of the preparation of the claimed compositions, whether for fungal control, as the instant methods require, or as fungicidal compositions, not precluded from the instant claims as fertilizer , would be obvious to One of ordinary skill in the agronomical arts to practice. The recent KSR Supreme Court decision of 2007 in KSR V TELEFLEX @ 82 USPQ 2d @ 1385, confers common sense upon the artisan to arrive at conclusions of obviousness. One of ordinary skill

would know that aqueous compositions of K Phosphate/Phosphonate concentrations could be prepared at the instant levels, & readily tested to determine efficacy as fertilizer, fungal protectants or other functionalities as desired.

Claims 1,2 ,6& 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barlet 5070083,Ducret et al 4139616,Horriere et al 5169646, Lovatt 5514200, Vetanovetz et al 53905418 and Smilie et al '89.

These references, of record , teach the instant Phosphonate salts are well known, art recognized fungicides (Bartlet, Ducret & Horriere) while Lovatt & Vetanovetz likewise teach the Phosphates are well known, art recognized fertilizers. Smillie shows the effectiveness of phosphite salts are enhanced with phosphates (p 924 of Smillie).

It would have been obvious to a person of ordinary skill in the art at the time the invention was made desiring to utilize fungicidal control means on plants, to use any of art recognized means, modified as desired to increase stability, dispersibility, compatability of ingredients, processing ease, decreased toxicity to handlers, increased toxicity to fungus, & to provide added benefit;fertilizer & fungicide in one application. The particular manner in which the compositions are made is not seen to be of patentable weight.

The amounts and proportions of each ingredient are result effective parameters chosen to obtain the desired effects. It

would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular species and application method of interest, reduction of toxicity, cost minimization, enhanced, and prolonged, or synergistic effects.

Applicant has not provided any objective evidence of criticality, nonobvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation as claimed, and the use of ingredient for the functionality for which they are known to be used is not basis for patentability.

The instant invention provides well known old art recognized compounds, with well known art recognized effects, applied by well known art recognized methods to achieve improved control as is well known in the art.

### ***Double Patenting***

Claims 1-14 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-12 of U.S. Patent No. 6509041.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the patent claims indicate (2,5,8,11) that the instant K phosphonates are present in aqueous solution, at the instant concentrations, & so will inherently control fungal disease & stimulate growth by the patent methods. Additional components, KOH are not excluded..

Claims 1-5,9-11 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 2,4,5 of U.S. Patent No. 5800837. Although the conflicting claims are not identical, they are not patentably distinct from each other because the patent claims encompass the instant compositions, ratios, & concentrations, thus besides stimulating growth, the patent would inherently meet the instant claim to control fungus.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

In accordance with 37 CFR 1.175(b)(1), a supplemental reissue oath/declaration under 37 CFR 1.175(b)(1) must be received before this reissue application can be allowed.

An example of acceptable language to be used in the supplemental oath/declaration is as follows:

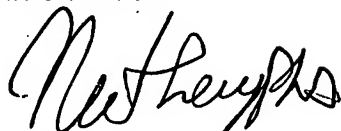
"Every error in the patent which was corrected in the present reissue application, and is not covered by a prior oath/declaration submitted in this application, arose without any deceptive intention on the part of the applicant."

See MPEP § 1414.01.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
NEIL S. LEVY  
PRIMARY EXAMINER